COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 07392-03**

Marylouise Tautkus	Employee
City of Brockton	Employer
City of Brockton	Self-insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Carroll and Costigan)

APPEARANCES
Bruce S. Lipsey, Esq., for the employee
Gregory F. Galvin, Esq., for the self-insurer

FABRICANT, J. The employee appeals from a decision in which an administrative judge awarded a closed period of total, and ongoing partial, incapacity benefits. The employee argues that the judge misconstrued the opinion of the § 11A impartial physician, and erred by reducing her benefits from § 34 to § 35. We agree, and reverse the decision in part.

On January 28, 2003, while working as a secretary, the employee suffered a slip and fall injury, for which the self-insurer accepted liability. At issue at the hearing was the extent of incapacity, causal relationship and medical benefit entitlement. (Dec. 2.)

The employee was examined by an impartial physician pursuant to §11A on February 12, 2004. The §11A report dated February 24, 2004 diagnosed the employee as having significant cervical degenerative disc disease at multiple levels from C3 to C7 with aggravation as well as bulging lumbar disc syndrome with central disc protrusion at L4-5 with resultant lumbar radiculopathy. The impartial physician found the employee's symptomatology to be work related, with the fall being the precipitating and aggravating factor. (Dec. 5.) The impartial doctor further opined that the employee was temporarily and totally disabled from returning to her previous employment, and that the employee probably could not perform her job for more than a couple of hours per day without symptom aggravation. (Dec. 5-6.) At his deposition, held on December 22, 2004, ten

months after his examination of the employee, the impartial physician opined that he "would expect" that the employee has a work capacity. (Dec. 6; Dep. 13.)

The judge adopted the impartial doctor's opinions, and concluded that the employee was totally incapacitated until the date of the doctor's deposition, and partially incapacitated on an ongoing basis after that. (Dec. 8.) The judge based his finding of partial incapacity on the doctor's deposition testimony that he expected the employee to be able to perform some sort of work at that time. (Dec. 8; Dep. 13.) The employee appeals.

The employee contends that the judge misconstrued the impartial medical evidence. We agree that the doctor's opinion as to the employee's work capacity at the time of his deposition was necessarily speculative, as it came ten months after his actual examination of the employee and depended on improvement not, in fact, achieved. At the end of his deposition, the doctor acknowledged the speculative nature of his opinion as to any change in the employee's condition since he examined her:

> A: I had commented before that I thought that her total disability was temporary depending on her response to further treatment. If another ten months have gone by here, and she hasn't improved, there may be more permanency to her symptom complex.
>
> Q: However, your current position with respect to work capacity would be otherwise speculative, Doctor?
>
> A: Not having seen the patient since February of 2004, it would be.

(Dep. 16-17.) A speculative medical opinion is not a competent medical opinion. See Russell v. Micron, 12 Mass. Workers' Comp. Rep. 183 (1998).

Moreover, the judge found that the doctor's admittedly speculative opinion as to the employee's present capacity to work was related to the employee's course of treatment over the ten months from the examination to the deposition. (Dec. 6, 8.) However, this connection does not appear in the doctor's testimony. All the doctor said was that, based on his examination, and on his review of the medical records, he "expected" the employee to have some capacity to work. (Dep. 13.) To the extent that

the doctor did testify that treatment would be a component of her improvement, (Dep. 12), we reiterate that the doctor never actually opined that the employee has, in fact, improved. The doctor opined that the employee's symptoms on February 10, 2004, the date of examination, would probably be aggravated if she were to perform her job for more than a couple of hours per day. We disagree with the self-insurer that this medical opinion requires a finding of only partial incapacity, particularly because the impartial doctor qualified that statement by recommending a functional capacity evaluation to determine the employee's capacity for secretarial work, if any. (Ex. 1, p. 4.)

Accordingly, we reverse so much of the decision as finds the employee only partially incapacitated and we vacate the award of § 35 benefits. Based on the expert testimony of the § 11A physician, adopted by the judge, the employee remains totally incapacitated. We order that the self-insurer pay § 34 benefits at the rate of $400.37 per week from September 21, 2003 and continuing.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: **February 14, 2006**